1965

State of Utah v. Robert Wayne Gleason : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

TATE OF UTAH,
Plaintiff-Respondent,

- vs -

OBERT WAYNE GLEASON,
Defendant-Appellant.

Case No.
10289

BRIEF OF RESPONDENT

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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NATURE OF THE CASE

Appellant appeals from a conviction of the crime of rape in violation of Section 76-53-15(3), Utah Code Annotated, 1953.

DISPOSITION IN LOWER COURT

The appellant was tried upon jury trial for the crime of rape in the Third Judicial District Court in and for Salt Lake County, State of Utah, on the 17th day of July, 1964. The jury returned a verdict of guilty and the appellant was committed to the Utah State Prison. The

appellant has prosecuted this appeal from the lower court's judgment.

RELIEF SOUGHT ON APPEAL

The respondent submits that the appellant's conviction by the trial court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts.

On April 14, 1963, at 10:30 p.m., Miss Fawn Dotson was standing on the corner of 13th South and State Street in Salt Lake City, waiting for a bus (R. 72). She observed the appellant, Robert Wayne Gleason, walk across the street from 13th South toward her. The appellant approached Miss Dotson, walked behind her and asked her if the bus had left yet (R. 77). She indicated that it had not and after a car had stopped, and the occupant had asked the appellant a question and left, the appellant put a pistol against the back of Miss Dotson and told her that if she didn't follow him, he would kill her. She tried to jerk away from him and run, but he grabbed her arm, held her, and told her that if she did anything like that again, he would kill her (R. 78). He forced her down to an alley where she started to scream and struck him with her purse. Her purse broke open and several items fell on the ground (R. 79). There was a truck with a meat sign on it in the alley (R. 79).

The appellant then threw Miss Dotson to the ground, hit her, choked her, and tore her clothing from her body (R. 80). Thereafter, he raped her, making complete penetration (R. 81). Subsequently, the appellant fled and Miss Dotson grabbed some of her clothing and returned to her boy friend's house, where the police were called (R. 82).

A police inspection of the area of the attack revealed that part of Miss Dotson's clothing was still at the scene and items which had fallen from her purse (R. 94, 96). Miss Dotson was taken to the Salt Lake County Hospital, where she was examined and found to have abrasions, bruises and scratches on the neck, breasts and thighs (R. 67, 68). Dr. David A. Hansen performed a routine pelvic examination and removed live, viable sperm (R. 70). He testified that the life of such sperm would be between 24 and 48 hours (R. 70). Miss Dotson testified at trial that she had not had intercourse for at least two days (R. 81).

Subsequently, Miss Dotson identified the appellant's picture from police mug shots and further identified the appellant at a police lineup (R. 83, 100, 103). Thereafter, the police recovered pants from the defendant's wife which resembled the pants Miss Dotson said her assailant was wearing. They contained mud on the side and knees which resembled that found at the scene of the crime (R. 111, 112).

Subsequent to the appellant's arrest and charge for the crime, he was admitted to the Utah State Hospital

for psychiatric examination. He remained there for a period of approximately one year before he was brought to trial (R. 15). At the time of the trial, the appellant did not take the stand and offered no evidence in his behalf except the testimony of two psychiatrists. Dr. Richard C. Gilmore testified that he observed the appellant at the State Hospital on June 10, 1963. At that time the appellant appeared psychotic, suffering from an acute schizophrenic reaction of a paranoid type (R. 119, 120). He testified that he could not determine whether the appellant suffered from any mental disease on April 14, 1963, at the time the crime was committed. He could not say whether at that time of the crime the appellant suffered from any mental disease or defect or would be legally insane (R. 120, 123, 125). He indicated that it was possible that the arrest of the appellant could have brought on his psychotic condition (R. 125). Dr. Roger S. Kiger, a psychiatrist at the Utah State Hospital, testified that he observed the appellant from June 10, 1963, to May 7, 1964, and during that time, the appellant's condition would vary from psychotic to normal. He testified that he could not determine or give an opinion as to the appellant's mental condition on April 14, 1963, nor could he determine whether at that time the appellant knew the difference between right and wrong, the nature of the act he committed, or could resist from committing the act (R. 134, 135). He testified that appellant's condition could change at the "snap of a finger" (R. 136). He further indicated that at the time the appellant was admitted to the State Hospital, he diagnosed

his condition as acute schizophrenic reaction, paranoid type (R. 129), but that the appellant admitted that he had been feigning mental illness and that he felt there was some attempt on the part of appellant to feign mental illness, but that his diagnosis was accurate (R. 136).

The trial court refused to submit the question of appellant's insanity to the jury on the grounds that the evidence of insanity was too remote and speculative.

Based upon the above evidence, the jury returned a verdict of guilty to the crime of rape.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN REFUSING TO SUBMIT THE ISSUE OF INSANITY TO THE JURY.

The appellant contends that the trial court should have submitted the issue of insanity to the jury. The evidence in this regard shows that the crime was committed on or about April 14, 1963. On June 10, 1963, the appellant was examined by a psychiatrist at the State Mental Hospital. According to the two psychiatrists that testified, when they saw the appellant on June 10, 1963, he was suffering from an acute schizophrenic reaction, paranoid type (R. 120, 129). In response to questions concerning the appellant's condition on the day the crime was committed, Dr. Richard C. Gilmore testified:

"Q. Could you, from your examination, arrive at a diagnosis as to his mental condition on or about the 14th day of April, 1963?

A. I could not.

Q. Now, Doctor, the description that you have given to us of the defendant, Mr. Gleason, do these conditions develop, usually, over-night?

A. I think this is within the realm of possibility.

Q. As a general rule, then, Doctor, may we assume that his condition arises from various things over a period of time?

MR. BANKS: I will object to that as a leading question, and also an assumption, rather than his opinion.

THE COURT: The objection is sustained; you may restate your question.

Q. Would it be your opinion, Doctor, that conditions such as Mr. Gleason's would develop over a period of time?

A. It is my opinion that this would be possible." (R. 120, 121.)

On cross examination, he testified:

"Q. Did he. Now, at that time, could you make a determination as to what his mental condition was on or about April 14, of 1964, based on your examination?

A. I could not.

Q. And, therefore, based on your examination, you couldn't tell whether or not, on April 14,

he could tell the difference between right and wrong, both legally and morally, could you?

A. I could not, sir.

Q. Based on your examination, you couldn't tell whether or not, on April 14, 1963, he would know the nature of the acts of 'intercourse' and 'forcible intercourse,' would you?

A. I could not testify to this, sir.

Q. And, at that particular time, you couldn't tell whether or not, from your examination, whether or not, on April 14, that he had a diseased mind to such an extent that it would prevent him from controlling his impulses?

A. I could not say so.

* * *

Q. Would a person with this diagnosis — person with this diagnosis — on occasion that is, does know the difference between right and wrong — legally and morally; isn't that correct?

A. This is possible, yes.

Q. It happens all the time, doesn't it?

A. I have observed this in this type of personality.

Q. And this type of individual, on a given occasion, also, would know the nature of his acts?

A. Yes, sir.

Q. And, also, on such an occasion, he would know the nature of having sexual intercourse; isn't that true?

A. Yes, sir.

Q. And, on occasions, individual of this type would also know the significance of forcing intercourse with a person; isn't that correct?

A. Yes, sir.

Q. And, on such occasions, even though a person of this nature might have a diseased mind, he would be able to control his impulses; isn't that correct?

A. Would you restate that, please?

Q. I say on such occasions—withdraw that question; rephrase it: On occasions, a person with the diagnosis and with this same diagnosis, would be able to control their impulses?

A. Yes, sir.

Q. Now, the mere fact that a person is mentally ill and hospitalized, Doctor, doesn't mean that he doesn't know what he is doing, does it?

A. In the broad, general term of 'mental illness,' this is **true; yes, sir.**

* * *

Q. Well, conditions can vary from day to day of a particular patient; isn't that true?

A. Yes, sir."

Dr. Gilmore further testified that the incident of being arrested might be sufficient to touch off appellant's condition (R. 126).

Dr. Roger S. Kiger testified that he was the appellant's physician at the State Hospital from June 10, 1963, to May 7, 1964. He testifed on direct examination:

"Q. Now, based upon your examination, were you able to form an opinion or to arrive at a diagnosis as to Mr. Gleason's mental condition on April 14, 1963?

A. I wasn't."

On cross examination he testified that when he first examined the appellant on the 10th of June, 1963, he was irrational, even though he was feigning symptoms and was unreliable (R. 130-137). He further testified:

"Q. And, from none of your examination or diagnosis, tests, have you been able to form an opinion as to this individual, as to whether or not he morally or legally knew the difference between right and wrong as of April 14th of 1963, have you?

A. I could not form an opinion.

Q. And, with the same background, you have never been able to form an opinion as to whether or not, as of April 14th of 1963, he did know the nature of the acts of intercourse; is that correct?

A. I would not know.

Q. Or forcing someone to have an act of intercourse with him; is that correct?

A. Would you repeat the last part?

Q. Yes; it is — it is a continuation of your prior answer.

A. That he would know?

Q. That — yes, that he would know the nature of forcing someone to having intercourse with him?

A. As of April 14th?

Q. As of April 14th?

A. I have never been in a position to know.

Q. And, as far as you know, he — you don't know whether or not he could control his impulses on April 14th, or not control them?

A. I would not know."

(R. 133, 134.)

The doctor indicated that most of the time that appellant was committed to the State Hospital, he knew the difference between right and wrong, knew the nature of his acts, and was capable of controlling his impulses. In response to how fast the appellant's mental condition could change, Dr. Kiger responded to the District Attorney's questions as follows:

"Q. Knowing what you do about this individual and — isn't it true that individual could take a flip-flop and be in as bad a condition as he was on June 10 of 1963?

A. By a definition of 'flip-flop,' in my mind, then the snap of the finger, I would say, yes, he could.

Q. But he could revert back to that condition?

A. Yes."

(R. 136.)

No evidence of any kind was offered by the appellant from his acquaintances or relatives to the effect that on the date the offense was committed, the appellant could not appreciate the nature of his acts, did not know the difference between right and wrong, and could not adhere to the right. Nothing in the testimony of the prosecutrix was to the effect that the appellant would have committed the act even in the presence of deterring authority. None of the police officers associated with appellant at the time of his apprehension testified to noticing appellant exhibit any symptoms of insanity. The appellant apparently attempted to commit the act in an area where he would be least likely to be detected as distinct from the area where he first approached the prosecutrix.

Although there is some evidence that appellant had psychiatric treatment approximately one year to a year and a half prior to the incident (R. 13), there is no showing that this psychiatric treatment was in any way related to the present incident or that at any time in the past, prior to the commission of the crime, had the appellant's condition been indicative of legal insanity. There is not one scintilla of evidence to indicate the appellant's condition at the time the crime was committed. It is well established that in this State, in order for a defendant to be excused from criminal misconduct, it must appear that at the time the crime was committed, either (1) the appellant did not know the nature of the act he was committing, or (2) he did not know that the act was

wrong, or (3) he could not control his impulses. *State v. Poulson,* 14 U.2d 213, 381 P.2d 93 (1963); *State v. Kirkham,* 7 Utah 2d 108, 319 P.2d 859 (1958).

It is the general rule at common law that the mental impairment of any defendant must appear to have existed at the time the crime was committed. Williams, *Criminal Law,* 2d Edition, The General Part, page 443. It is settled that the evidence of any diminished faculty of an accused must be related to the time of the crime. Wigmore, *Evidence,* 3rd Edition, Sec. 931.

It is well established that although the prosecution bears the overall burden of proving a defendant's guilt, it is presumed that a defendant in any criminal case is sane and the burden of proof of going forward with evidence to overcome the presumption rests upon the defendant. In Wharton, *Criminal Evidence,* Vol. 1, 12th Ed., Sec. 28, it is stated:

> "* * * The prosecution has the burden of proving that the defendant had the capacity to commit the crime charged, but it may initially rely on the presumption of sanity. That is, since everyone is rebuttably presumed sane, it will be assumed that the defendant has sufficient capacity, and the burden is upon him to prove that he is insane."

In *State v. Brown,* 36 Utah 46, 102 Pac. 641 (1909), this court observed:

> "* * * No doubt the presumption of sanity in the absence of any evidence to the contrary, makes *prima facie* case in favor of sanity. It is, however, a presumption of fact merely, and prevails unless

> overcome by countervailing proof. In this jurisdiction the burden of overcoming this presumption rests primarily upon the defendant. *He is required to overthrow it, by a preponderance of the evidence offered in the case upon the subject.* (Emphasis added.)

Subsequently, in *State v. Mewhinney,* 43 Utah 135, 134 Pac. 632 (1913), the court had before it a conviction of the appellant for the crime of murder in the first degree. In affirming the judgment, the court held that the evidence presented was not sufficient to warrant an instruction to the jury on the issue of insanity and, consequently, no error from imperfect instructions could be claimed.[1] The evidence in the *Mewhinney* case was substantially stronger than the evidence in the instant case to the extent that it was directed to the condition of the defendant at the time the crime was actually committed. In the instant case where the evidence would be speculative and remote, and where the jury had before it no evidence as to the appellant's condition at the time the crime was committed, it can hardly be said that the appellant carried his burden of going forward with sufficient evidence to indicate his insanity at the time of trial. In *State v. Green,* 78 Utah 580, 6 P.2d 177 (1931), this court ruled:

> "* * * Until evidence is offered and received at the trial which tends to show that the defendant was insane *at the time of the alleged crime,*

[1] In *State v. Green,* 78 Utah 580, 6 P.2d 177 (1931), the court characterized the Mewhinney case as standing for the proposition: "That there was not sufficient evidence to entitle the defendant to go to the jury on the question of insanity." loc. sit. 593.

> the state may rely upon the presumption of sanity and need not offer evidence to establish that fact. In the absence of evidence, sanity is assumed to exist without evidence of its existence." (Emphasis added.)

Although the court indicated that a defendant's burden has been met when some evidence of insanity is introduced, it noted that the evidence must "tend to show the accused was insane *at the time of the alleged offense.*"

There is no evidence of any kind tending to show insanity at the time of the offense in the instant case. The psychiatric testimony was neutral and, at least, one psychiatrist indicated that the appellant's condition could have been brought about by his arrest, and, further, appellant's condition could change with the "snap of a finger."

The appellant argues, however, that since there is some evidence that, within a period of 55 days after the crime, the appellant was insane, the jury could infer therefrom that the appellant was insane at the time the crime was committed. This argument overlooks two salient facts. First, the condition which the appellant was suffering from at the time he was first examined by the doctors was a fluctuating one which could vary instantaneously. Second, appellant's involvement, subsequent to the commission of the crime, could have been responsible for the later condition. The appellant's argument is analogous to the presumption of continuing insanity. There is a rule of law that where it is shown that an individual is insane, it will be presumed that he continued

to remain insane. 27 A.L.R.2d 121. In the instant case, the appellant urges that some form of presumption that the appellant was insane at the time the offense was committed can be indulged from the fact that he was insane at some time subsequent to the offense. However, the cases are virutally unanimous that no such presumption of continuing insanity, even were it applicable to this fact situation, arises where the nature of the mental illness is spasmodic. Thus, in 27 A.L.R.2d 121, at page 124, it is observed:

> "Most of the courts which have, in criminal cases, recognized that presumption of continuing insanity arises from proof that the accused was, at a time earlier than that under investigation, afflicted with insanity, have held that this presumption arises only where the earlier insanity shown by the evidence was permanent, chronic, or of a continuing nature, and not merely temporary or spasmodic."

Further, at page 135, it is stated:

> "There is some basis (in the legal if not the medical books) for drawing a distinction between spells of insanity which are purely temporary or spasmodic in nature, and those forms of insanity where the affliction, while permanent and continuing, is cyclic in nature, so that the person affected is subject to recurrent periods of insanity separated by lucid intervals. In a number of cases it has been said that upon a showing that the defendant's prior insanity was interrupted by lucid intervals, no presumption of continuing insanity arises, and the burden is upon the accused to show

his insanity at the time of committing the offense charged."

It is apparent, therefore, that there is no legal basis for the appellant's contention that he met his burden of going forward with the evidence by a showing of insanity subsequent to the event. This evidence was substantially remote to the time in question.[2] Since it was remote and speculative, it was well within the province of the trial judge not to present the matter to the jury. *State v. Schuman,* 151 Kan. 749, 100 P.2d 706 (1940); 22 C.J.S. *Criminal Law,* Sec. 639.

It is settled that it is not error for a court to fail to give an instruction on insanity where the evidence is insufficient to raise the issue for jury consideration. *People v. Cunningham,* 245 P.2d 450 (Calif. 1926); *People v. Francis,* 38 Calif. 183; *United States v. Wilson,* 9 U.S.C.M.A. 60, 25 C.M.R. 322 (1958).

In *United States v. Regan,* 10 U.S.C.M.A. 323, 27 C.M.R. 397 (1959), the appellant was convicted of the crime of assault with a deadly weapon and the intentional infliction of grevious bodily harm. Various witnesses testified that the appellant's conduct was strange, disturbed and sickly at the time of the commission of the crime. The court ruled the evidence insufficient to warrant an instruction on insanity.

It is submitted that the court did not err in not instructing the jury on the issue of insanity where there

[2]See *Moore v. D. & R.G.W. Ry.,* 4 U.2d 255, 292 P.2d 849, where this court indicated that mere medical possibilities do not raise sufficient evidence for jury consideration.

was not a scintilla of evidence as to the appellant's condition at the time the crime was committed.

Although the appellant does not raise the issue as a point of error in his brief, he does note and challenge the court's failure to give an instruction to the effect that every criminal offense requires a union of act and intent. The failure to give such an instruction could hardly have prejudiced the appellant. The jury was expressly instructed by the Court's Instructions No. 8 and No. 11 as to the requirement that the accused must willfully have committed the act. Rape is an offense which does not require a specific intent but just a general intent to commit the act. *Walden v. State,* 178 Tenn. 71, 156 S.W.2d 305 (1941). Since the jury was otherwise appraised of the essential elements of the crime, the instruction on the union of act and intent was superfluous and unnecessary. Further, since the point has not been specifically raised on appeal, it is not properly before the court.

POINT II.

THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY ON THE OFFENSE OF ASSAULT WITH INTENT TO COMMIT RAPE, BECAUSE:

(a) THE REQUEST FOR SUCH AN INSTRUCTION WAS NOT TIMELY, AND

(b) THE EVIDENCE DID NOT RAISE THE ISSUE AS TO ANY LESSER INCLUDED OFFENSE.

(a) At the time of trial the appellant requested an instruction on the question of assault with intent to com-

mit rape (R. 138). The court refused such an instruction, noting that the question of request for instructions had been considered the previous evening and the only request made at that time was for an instruction on assault and battery. It is apparent, therefore, that the appellant did not make a timely request in accordance with local court rules and cannot object to the failure of the court to give the instruction as requested. *People v. Pearson,* 150 Calif. App.2d 811, 311 P.2d 142; *People v. Northum,* 115 Calif. App. 2d 606, 252 P.2d 686.

(b) The evidence in the instant case clearly shows that an assault took place on the person of Fawn Dotson. The prosecutrix testified, without contradiction, that the appellant effected penetration. Further, upon examination by a treating physician at the Salt Lake County Hospital, viable sperm was removed from the vaginal vault of the prosecutrix. No evidence of any kind was introduced to dispute the fact of penetration or to weaken the contention that the crime of rape had in fact been consummated. The appellant himself remained silent on the issue of the consummation of the crime. There was no evidence to rebut the statement of the prosecutrix or to raise any factual contest that the crime of rape itself had not been committed. Under these circumstances, it is clear that no issue as to the lesser included offense was raised.

It is admitted that assault with intent to commit rape is lesser included within the crime of rape (*State v. Blythe,* 20 Utah 378, 58 Pac. 1108), and although a

conviction of the lesser offense in the face of overwhelming evidence of the greater offense would stand because the defendant could not be harmed, still, there is no requirement that a jury be instructed on lesser offenses unless a reasonable basis for the instruction appears from the evidence. In *State v. Angle,* 61 Utah 432, 215 Pac. 531 (1923), this court stated:

> "It is a well-settled rule that instructions as to lower grades of the offenses charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged where there is no evidence to reduce the offense to a lesser grade. 1 Blashfield, Instructions to Juries (2d Ed.) §408."

In *State v. Ferguson,* 74 Utah 263, 279 Pac. 55 (1929), this court again noted:

> "It is a well settled rule that instructions as to lower grades of the offense charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged, where there is no evidence to reduce the offense to a lesser grade."

In the same case, Justice Straup, concurring, noted:

> "I concur in the result. I concur in the general statement as announced in some of the texts and cases that *when there is no evidence to support a conviction of a lesser offense, a court is not*

> *required to submit it to a jury,* and concur in the statement in the prevailing opinion that instructions as to lower grades of a charged offense, when embraced and included therein, should be given when warranted by evidence."

More recently, in *State v. Mitchell,* 3 U.2d 70, 278 P.2d 618 (1955), this court again reiterated the doctrine that before a failure to instruct on a lesser included offense can be claimed as error, there must be "evidence from which reasonable persons could conclude that the lesser offense was committed." Therefore, unless there was evidence of record that would allow "reasonable persons" to find that some lesser offense, such as assault with the intent to commit rape, was committed, the court did not err in refusing to so instruct.

In *People v. Abeyta,* 134 Colo. 441, 305 P.2d 1063 (1957), the Colorado Supreme Court noted that the only evidence before the court in a forcible rape case showed that the crime in fact had been committed. It ruled that under such circumstances the failure to submit the lesser included offense of assault with intent to commit rape could in no way prejudice the defendant. The court ruled:

> "* * * Under the record as made, the defendants were guilty of forcible rape or nothing at all. They contended they had no contact with the prosecutrix, and were, as above stated, in Pueblo, Colorado. The only evidence before the jury was that a rape had been committed, and we perceive no error in the refusal of the trial court to give defendants' tendered Instruction No. 1."

In *People v. Cardaropali,* 115 Calif. App.2d 235, 251 P.2d 692 (1953), the court observed:

> "* * * The evidence disclosed a rape and not a mere attempt. While the defendant struck the complaining witness this was incidental to the commission of the rape, and it is inconceivable that the jury could have believed that part of the complaining witness' testimony without believing the rest of it. The defendant relied entirely on the contention that he was not there, and having rested his case on that ground he is in no position to complain that a miscarriage of justice resulted from any failure to instruct the jury with respect to the inclusion of a lesser offense. *People v. Meichtry,* 37 Cal.2d 385, 231 P.2d 847; *People v. Ross,* 89 Cal.App. 132, 264 P. 314. There was no evidence which would tend to reduce the offense from that charged in the information, the defense offered no evidence contradictory to that offered by the prosecution in this regard, and neither error nor prejudice appears from the court's failure to give such an instruction on its own motion."

In *State v. Brown,* 16 U.2d 57, 395 P.2d 727 (1964), the appellant was convicted of the crime of rape. The evidence of the actual commission of the crime of rape was less solid than that now before the court. On appeal it was argued that the trial court erred in not giving an instruction on the lesser included offense of assault with intent to commit rape (See Brief of Respondent, Case No. 10067). The court, in passing upon the case on appeal, summarily rejected the argument without discussion, finding the issue was unmeritorious.

It is apparent, therefore, that the issue in the instant case raises no basis for relief on appeal.

CONCLUSION

The facts in the instant case clearly show the commission of the crime of rape. The appellant's contention that the trial court should have instructed the jury on the lesser included offense is at best frivolous. The argument that the jury should have been allowed to speculate as to the appellant's mental condition at the time of the commission of the offense has no valid foundation in law or in fact. There was not a scintilla of evidence except mere speculation alone that the accused was insane at the time of the commission of the instant offense. The record is devoid of evidence going to the elements of legal insanity at the time the offense was committed. Further, the psychiatric testimony does not demonstrate any positive evidence that the accused was insane at the time of the commission of the offense sufficient to overcome the presumption of insanity.

The trial court acted properly in not leaving to the jury a matter which had only conjecture to support it.

This court should affirm.

Respectfully submitted,

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